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NO. 28403-4-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

DOUGLAS ROSE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR BENTON COUNTY

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT.

A police officer stopped Douglas Rose as he walked along a sidewalk in the middle of the day because the officer believed he matched the description given in a recent call about a possible crime. The officer immediately handcuffed Rose and ordered him into a closed police car while the officer decided whether to arrest Rose. Later, the officer learned there was no cause to arrest Rose for the earlier incident, but then he spied what he thought was drug paraphernalia, arrested Rose, and searched him.

Because the police arrested Rose without probable cause he committed a crime, and had no basis to arrest him for possession of drug paraphernalia that he did not see Rose use, the arrest and search were unlawful. Moreover, the court improperly held a bench trial without informing Rose of the right to a unanimous trial by jury and absent a written waiver of a jury trial. Finally, the court improperly convicted Rose of possessing a stolen credit card when the credit account information in Rose's possession was useless discarded garbage.

B. ASSIGNMENTS OF ERROR.

1. There was insufficient evidence to convict Rose of possession of stolen property when the property had been

discarded and consisted of a credit card application for which the activation fee had never been paid and the owner never intended to use.

2. Rose was denied his right to trial by jury as guaranteed by Article I, sections 21 and 22 of the Washington Constitution and the Sixth Amendment when the court found he waived his right to a jury absent an adequate colloquy and without a written waiver.

3. The police impermissibly detained and arrested Rose without probable cause, contrary to the Fourth Amendment and Article I, section 7 of the Washington Constitution.

4. The court improperly entered Finding of Fact 12 following the bench trial because it is not supported by substantial evidence in the record. CP 27.[1]

5. The court improperly entered Finding of Fact 13 following the bench trial because it is not supported by substantial evidence in the record. CP 27.

6. The court improperly entered Finding of Fact 19 following the bench trial because it is not supported by substantial evidence in the record. CP 27.

[1] The findings of fact from the bench trial are attached as Appendix A.

7. The court improperly entered Finding of Fact 21 following the bench trial because it is not supported by substantial evidence in the record. CP 27.

8. The court improperly entered Finding of Fact 22 following the bench trial because it is not supported by substantial evidence in the record. CP 27.

9. The court improperly entered Finding of Fact 23 following the bench trial because it is not supported by substantial evidence in the record. CP 28.

10. The court improperly entered Finding of Fact 24 following the bench trial because it is not supported by substantial evidence in the record. CP 28.

11. The court improperly entered Finding of Fact 25 following the bench trial because it is not supported by substantial evidence in the record. CP 28.

12. To the extent the court's conclusions of law are construed as findings of fact, the court improperly entered Conclusions of Law 1, 2, and 5 following the bench trial because they are not supported by substantial evidence in the record. CP 28.

13. To the extent the court's conclusions of law following the CrR 3.6 hearing are construed as findings of fact, the court improperly entered Conclusions of Law 1, 2, 3, 4, 5, and 6 because they are not supported by substantial evidence in the record. CP 53.[2]

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Possession of a stolen access device requires proof that the accused person has account information that can be used to acquire something of value and withholds that account information from the true owner. Here, Rose had information upon which a person could use to open a credit card account but its owner had thrown it away because the owner never intended to use this offer of to open a credit card account or to pay the necessary activation fee. Did the court improperly convict Rose of possession of stolen property when the account information he possessed had never been used, he could not use, and the intended owner of the account information could not use in its present form?

2. The fundamental right to a trial by jury is strictly protected in Washington, even more so than the federal constitution. Both constitutional protections may be waived only when the record

[2] The findings of fact entered after the CrR 3.6 hearing are attached as

establishes a knowing, intelligent, and voluntary waiver of the rights at issue. Here, Rose did not file a written jury waiver and did not waive his right to a trial by unanimous jury. Did the State fail to demonstrate that Rose knowingly and intelligently waived his right to a unanimous jury trial?

3. A person may be arrested without a warrant only with probable cause that he committed a crime for which a warrantless arrest is permitted. Here, the police first arrested Rose based on bare suspicion that he might have committed a crime and after that basis to arrest him expired, arrested him for possession drug paraphernalia without evidence that he had actually committed that offense. Did the police lack probable cause to arrest Rose and must the evidence gathered from Rose's unlawful arrest be suppressed?

D. STATEMENT OF THE CASE.

On September 16, 2008, at about 10 a.m., two Richland police officers responded to a call of a possible trespass or burglary. 5/21/09RP 3-4.[3] Officer Tom Croskey stopped Douglas Rose, who was walking along the street, because he matched the

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App. B.

[3] The verbatim report of proceedings (RP) are referred to by date of proceeding followed by the page number.

description of the perpetrator. 5/21/09RP 6. Croskey believed Rose was fidgety and saw a knife clipped onto his belt, so he immediately handcuffed Rose, removed his knife, frisked him, put him into the police car, and closed the door. 5/21/09RP 9, 11, 25.

Croskey waited by the police car, with Rose inside, until the other officer arrived who had spoken with the 911 caller. 5/21/09RP 7, 11. When Officer Allen Jenkins told Croskey that the caller did not wish to pursue the matter of a possible trespass, Croskey looked at the bag Rose had set down when Croskey stopped himg. 5/21/09RP 25. Rose had placed that bag on the ground, at Croskey's order, before Croskey handcuffed Rose and put him in the police car.

Croskey saw part of a tube protruding from the bag, and he believed the tube was "consistent with" drug paraphernalia. 5/21/09RP 12. Croskey arrested Rose for possession of drug paraphernalia, and upon searching him incident to the arrest, found a credit card in the name of Ruth Georges. 5/21/09RP 25; 6/30/09RP 41.

The State charged Rose with one count of possession of stolen property in the second degree and one count of possession of methamphetamine, a controlled substance, after the State Crime

Laboratory tested the residue in the glass pipe. CP 1-2; 6/30/09RP 29, 40. Without filing a written waiver of his right to a trial by unanimous jury, Rose waived his right to a jury trial. 5/28/09RP 5.

At Rose's trial, Ruth Georges testified that Rose had visited her apartment in the morning of the day he was arrested. 6/30/09RP 84. She had received a credit card that required her to pay $30 before she could use it, and because she did not have $30 and did not wish to use the card, she put it in the garbage. 6/30/09RP 86. She did not know that Rose had the card. 6/30/09RP 84. Rose testified that he did not know the credit card was in his belongings and it must have been put there when Georges mixed his belongings up with trash. 6/30/09RP 103-04. Rose did not try to use the card.

The court convicted Rose of both charges and imposed standard range sentences. This appeal timely follows. Pertinent facts are addressed in further detail in the relevant argument sections herein.

E. ARGUMENT.

1. ANOTHER PERSON'S POSSESSION OF DISCARDED, UNUSABLE PROPERTY DOES NOT CONSTITUTE "POSSESSION OF STOLEN PROPERTY"

a. Possession of stolen property requires evidence that the property was unlawfully taken and withheld from the owner, and does not apply to property that was purposefully thrown into the trash. The State has the burden of proving each element of the crime charged beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 25 L.Ed.2d 368, 90 S.Ct. 1068 (1970); State v. Cronin, 142 Wn.2d 568, 580, 14 P.3d 752 (2000). This allocation of the burden of proof to the prosecutor derives from the guarantees of due process of law contained in Article I, section 3 of the Washington Constitution[4] and the 14th Amendment of the federal constitution. Sandstrom v. Montana, 442 U.S. 510, 520, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); State v. Acosta, 101 Wn.2d 612, 615, 683 P.2d 1069 (1984). On a challenge to the sufficiency of the evidence, this Court must reverse a conviction when, after viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found all the essential elements

of the offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

In a claim of insufficiency, the reviewing court presumes the truth of the State's evidence as well as all inferences that can be reasonably drawn therefrom. State v. Theroff, 25 Wn.App. 590, 593, 608 P.2d 1254, aff'd, 95 Wn.2d 385, 622 P.2d 1240 (1980). However, when an innocent explanation is as equally valid as one upon which the inference of guilt may be made, the interpretation consistent with innocence must prevail. United States v. Bautista-Avila, 6 F.3d 1360, 1363 (9th Cir. 1993). "[U]nder these circumstances, a reasonable jury must necessarily entertain a reasonable doubt." United States v. Lopez, 74 F.3d 575, 577 (5th Cir. 1996). Speculation and conjecture are not a valid basis for upholding a jury's guilty verdict. State v. Prestegard, 108 Wn.App. 14, 23, 28 P.3d 817 (2001).

Rose was charged with one count of possession of stolen property in the second degree based on an unactivated and unused credit card the police found in Rose's possession upon a

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[4] Art. I, section 3 provides, "No person shall be deprived of life, liberty, or property, without due process of law."

search incident to his arrest for the unrelated offense of possession of drug paraphernalia. CP 1; 6/30/09RP 29, 41, 86.

Possession of stolen property in the second degree as charged requires the prosecution prove Rose possessed a "stolen access device." RCW 9A.56.160(1)(c). A person possesses stolen property when the person retains the property "knowing it has been stolen" and "withhold[s] it" from the true owner for use by another. RCW 9A.56.140(1). An "access device" is defined by statute as a card or other means of "account access" that "can be used alone or in conjunction with another device" to obtain anything of value. RCW 9A.56.010(1).[5]

b. When a card cannot be used and has never been used, it is not an "access device" under the statutory definition. Statutes setting forth the essential elements of criminal offenses must be strictly construed. United States v. Lanier, 520 U.S. 259, 266, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997); In re Carson, 84 Wn.2d 969, 973, 530 P.2d 331 (1975) (recognizing criminal

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[5] "Access device" means any card, plate, code, account number, or other means of account access that can be used alone or in conjunction with another access device to obtain money, goods, services, or anything else of value, or that can be used to initiate a transfer of funds, other than a transfer originated solely by paper instrument.
RCW 9A.56.010(1).

statutes are strictly construed against State when they involve a deprivation of liberty). Only conduct "clearly" covered by a criminal statute may be penalized. Lanier, 520 U.S. at 266. "Under the rule of lenity, where a statute is ambiguous, we must interpret it in favor of the defendant." State v. Jacobs, 154 Wn.2d 596, 603, 115 P.3d 281 (2005).

The statutory definition of an "access device" for possession of stolen property under RCW 9A.56.160(1)(c) requires that the "means of account access" at issue must be capable of being used for obtaining something of value. RCW 9A.56.010(1) (requires access to an account that "can be used"). Furthermore, the offense of possessing stolen property requires that the accused person "withhold or appropriate the same [stolen property] to the use of any person other than the true owner or person entitled thereto." RCW 9A.56.140(1). Thus, the accused person must be depriving the owner of use of the property by his or her unauthorized possession.

Here, Rose had a card that had never been activated and never would be activated. 6/30/09RP 84, 86. It was not a card Georges had ever used and it could not be activated unless Georges paid $30 to the company. Georges "didn't want it," had no

intent to ever pay the $30 necessary to use this account and consequently she threw the card away. Id. at 86.

This case is unlike the case on which the court relied, State v. Clay, 144 Wn.App. 894, 184 P.3d 674 (2008), rev. denied, 165 Wn.2d 1014 (2009), where the defendant possessed a replacement Mervyns credit card used for a valid on-going account but the particular card had not been activated by the owner. CP 28. The court in Clay ruled that the statute does not require that the owner possess the card before it was taken. Id. at 898.

In Clay, the card's owner testified that she had a valid, on-going credit account at Mervyns and that she expected to receive a new credit card for that account but she had not received that card in the mail. 144 Wn.App. at 896, 899. The card's owner would have been able to access her credit account had she received the card because she had a presently active account with the company issuing it. Id. Importantly, the Clay court relied on the fact that "there was 'no testimony that any additional steps needed to be taken to activate that card.'" Id. at 899.

Rose could not have used Georges' card to access anything of value. Unlike Clay, where the owner had on-going access to a credit account at the store and "there was no testimony that any

additional steps needed to be taken to activate that card," here, the Georges needed to pay money to activate the card, did not have an on-going account with the company, and did not intend to access the account. See Clay, 144 Wn.App. at 899.

Unlike the facts of Clay, the card in Rose's possession could not have been used by the owner to obtain anything of value. The owner needed to pay $30 before she would be entitled to use the card to make any purchases, and the owner did not have a spare $30 and did not intend to ever use the card. 6/30/09RP 86. Thus, the card did not supply anyone with access to any account and it does not meet the definition of a stolen access device as set forth by RCW 9A.56.010(1) and the requirements of possession of stolen property under RCW 9A.56.140(1).

c. Discarded property that has no present value is not property that is being withheld from the owner. The trial court in the case at bar relied on State v. Askham, 120 Wn.App. 872, 86 P.3d 1224, rev. denied, 152 Wn.2d 1032 (2004), to find that property taken from a trash can still belongs to the original owner of the property. CP 28 (Conclusion of Law 3). However, the issue in Askham is far afield from the case at bar.

In Askham, the defendant embarked on extensive efforts to harass and stalk his former girlfriend's new boyfriend. 120 Wn.App. at 875-77. Among other things, the defendant took items out of the new boyfriend's garbage, including credit card receipts. Id. at 876-77. Once he obtained the new boyfriend's credit card account number from the trash, he used the credit card to enroll the new boyfriend in a racist internet group, as part of his efforts to tarnish the reputation of the new boyfriend. Id. at 885.

The defendant in Askham argued that he did not possess a stolen access device because he got the complainant's credit card information from the trash and did not have the account's expiration date, thus he did not know all the account information. Id. A representative of the credit card company testified at trial that Askham did not need any more information to use the credit card. Id. Indeed, the prosecution presented evidence that Askham had used the complainant's credit card account on at least one occasion. Id.

The only real similarity between Askham and Rose's case is that both men are accused of taking items from the trash. But Mr. Ashkam took a working, valid credit card account number from the complainant's trash and he used it. Rose had an unactivated

account that could not be used in its present form, even by the card's owner, and he never used it or tried to use it. Thus, Ashkam does not explain how Rose exerted unauthorized control over credit card account information.

Whether a person possesses means of accessing another person's account depends on the status of the account at the time the lawful owner last possessed the account information. State v. Schloredt, 97 Wn.App. 789, 987 P.2d 647 (1999). In Schloredt, the defendant argued that an essential element of possessing a stolen access device is that the credit card was valid, and not expired or revoked, at the time the defendant possessed it. In Schloredt, even though there was no testimony that the owners of the nine credit cards in the defendant's possession had de-activated their credit cards, the defendant contended the State must prove the cards were active at the time the defendant had them. Id. at 793-94. The Schloredt Court rejected the defendant's effort to read an additional requirement into the statute, and found that the statutory requirement that an access device "can be used" means that at the card was valid and active at the time the lawful owner last had it. Id. at 794.

The Schloredt ruling rested in part on discerning the meaning of a change in the definition of a stolen credit card for purposes of possessing stolen property. Whereas the prior statute defined stolen credit card to include any device even if "incomplete, revoked, or expired," the new definition of stolen "access device" does not speak to the status of the card other than that it must be one that "can be used" to obtain something of value. Id. at 793-94 (discussing 1987 amendment to RCW 9A.56.010). The Schloredt Court concluded that consistent with principles of statutory construction, the court must interpret the statute based on the terms as defined in the new statute, without assuming that omitted words create new elements. Id. at 794; see United States v. Hoffman, 154 Wn.2d 730, 741, 116 P.3d 999 (2005) ("It is an axiom of statutory construction that where a term is defined we will use that definition."); State v. Delgado, 148 Wn.2d 723, 729, 63 P.3d 792 (2003) (court must assume legislature meant what it said).

The controlling statutory definition requires both that the card "can be used" and the person wrongfully possessing the card is withholding such lawful use from the card's owner. RCW 9A.56.010(1); RCW 9A.56.140(1). In the case at bar, Georges

could not have used the card when she last possessed it, she never intended to use the card, and Rose's possession of the card did not affect Georges' ability to use it. Therefore, the court impermissibly convicted Rose of possession of stolen property in the second degree.

Several of the court's findings of fact regarding Rose's possession of the card are unsupported by the evidence and contrary to governing law. Following a bench trial, the trial court must enter findings of fact addressing all material elements of a charged offense. State v. Head, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998); CrR 6.1(d). The court's failure to find that elements necessary to the charged crime were proven beyond a reasonable doubt demonstrates that the prosecution did not prove these critical facts beyond a reasonable doubt. State v. Armenta, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997).

The court's finding that Georges threw the credit card "into the trash receptacle that was located in, and at all times relevant hereto, remained in her apartment," is not supported by substantial evidence. CP 27 (Finding of Fact 13). Georges testified that she put the card into an empty cigarette box and put it in the trash. 6/30/09RP 84. She said, "I threw it away." Id at 86. She never

explained where her trash can was. She lived in an apartment building and did not explain whether her trash receptacle was inside her apartment or outside of it. Id. at 83. This finding of fact is predicated on speculation and not drawn from evidence in the record.

The court inexplicably reversed the burden of proof, finding that there was no evidence Rose could not have activated the card, although the court added that there was no evidence on this point either way. CP 27 (Finding of Fact 12). Unlike Askham, where the State presented evidence that the card could be and was used without the user's knowledge of the expiration date, in the case at bar the prosecution presented no evidence that Rose could have used the account information to obtain anything of value, and there was no evidence that he ever tried to do so. 120 Wn.App. at 885. Thus, this finding of fact is not supported by the evidence and smacks of the court's misunderstanding of the State's burden of proof. Winship, 397 U.S. at 364.

The court also found that Rose "withheld and appropriated the card for his own use," and yet there was no testimony that he used, tried to use, or intended to use the card. CP 27 (Finding of Fact 21). The court also impermissibly found the card met the

statutory definition of a stolen access device. CP 27 (Finding of Fact 19). Rose denied knowing he had the card, and while the court disbelieved that testimony, there is no factual support for the court's speculation that Rose was going to use the card or that he had the ability to do so.

Similarly, the court's findings that Rose "intended to deprive Ms. Georges of the possession and use of the credit card," and "knew the credit card was stolen," are unsupported by substantial evidence and must be stricken. CP 27-28 (Findings of Fact 22, 24, 25). Neither Rose nor Georges indicated any intent to use the account. Georges testified that she threw the card away because, "I don't want it." 6/30/09RP 86. She never intended to use it and did not have the ability to use it because, "I don't have $30" and the card required her to provide the company with $30 in order to activate the account. Id. Rose's possession of the card did not withhold or deny Georges' ability to use the card.

Georges said she put the card into the garbage can. 6/30/09RP 86. The act of discarding the card and leaving it in the garbage would alert Rose that Georges purposefully did not intend to use it. Thus, Rose did not know that the card was stolen, and did not know that Georges ever intended to try to use it, and the

court's findings otherwise are contrary to the record. The court's unsupported findings must be stricken, and the court's erroneous conclusions of law must be disregarded as they are based on a misunderstanding of the elements of possession of stolen property. CP 28 (Conclusions of Law 1, 2).

d. Rose's conviction for possession of stolen property must be reversed and dismissed. The prosecution failed to prove that Rose knowingly withheld a stolen credit card from its owner when the card could not have been used by the owner and the owner threw it away because she never intended to use it. Absent proof of every essential element, the conviction must be reversed and the charge dismissed. State v. Hundley, 126 Wn.2d 418, 421-22, 895 P.2d 403 (1995).

2. A CONSTITUTIONALLY VALID WAIVER OF TRIAL BY JURY REQUIRES A KNOWING AND INTELLIGENT WAIVER OF THE RIGHT TO A JURY TRIAL

a. The State must prove a valid waiver of the right to trial by unanimous jury based on the existing record. The Sixth Amendment protects the right to a jury trial as one of the most fundamental of constitutional rights, one which an attorney may not waive "without the fully informed and publicly acknowledged

consent of the client." Taylor v. Illinois, 484 U.S. 400, 418 n.24, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988). In Washington, "the right to trial by jury shall remain inviolate." Art. I, § 21.

Under the state constitution, the court lacks authority to enter a verdict not expressly authorized by a unanimous jury finding, absent a valid waiver. State v. Williams-Walker, __ Wn.2d __, 2010 WL 118211, *5 (2010). The state constitution expressly requires a unanimous jury verdict. State v. Depaz, 165 Wn.2d 842, 853, 204 P.3d 207 (2009); Wash. Const. art. I, §§ 21, 22. Our state constitutional right to a trial by jury "provides greater protection for jury trials than the federal constitution." Williams-Walker, 2010 WL 118211 at *2; see Pasco v. Mace, 98 Wn.2d 87, 99, 653 P.2d 618 (1982).

Together with the constitutional requirement to due process of law, the jury trial guarantee entitles a defendant to "a jury determination of every element of the crime with which he is charged beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). Waiver of the jury trial right must be made knowingly, intelligently, and voluntarily. State v. Hos, __ Wn.App. __, COA 37860-4-II (Jan. 26, 2010); see Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct.

1019, 82 L.Ed. 1461 (1938). "The State bears the burden of establishing the validity of the defendant's jury trial waiver, and we must indulge every reasonable presumption against such waiver, absent a sufficient record." Hos, Slip op. at 10. The validity of a jury trial waiver is reviewed de novo. Id.

Waiver of the right to a jury trial may not be presumed. The record must show "the express and intelligent consent of the defendant." Patton v. United States, 281 U.S. 276, 312, 50 S.Ct. 253, 74 L.Ed. 854 (1930).

CrR 6.1 demands a defendant file a written document demonstrating a valid waiver of a jury trial.[6] CrR 6.1(a) implements the constitutional requirement that a jury trial must occur unless a defendant knowingly, intelligently and voluntarily waives that right. State v. Wicke, 91 Wn.2d 638, 644, 591 P.2d 452 (1979). In the case at bar, Rose never filed a written waiver of a jury trial.

Rose's failure to file a mandatory written jury trial waiver violates the plain terms of CrR 6.1(a). The lack of a written waiver requires reversal unless the record otherwise establishes the

[6] CrR 6.1(a) provides: "Cases required to be tried by jury shall be so tried unless the defendant files a written waiver of a jury trial, and has consent of the court."

knowing, intelligent, and voluntary waiver of a trial by jury. Wicke, 91 Wn.2d at 644; Hos, Slip op. at 10.

b. Without any written waiver, Rose's limited discussion with the trial judge does not prove a knowing, intelligent, and voluntary waiver of the right to trial by unanimous jury. In the case at bar, even after partial discussions with Rose about waiving a jury trial, the court said it "would want" a written waiver from Rose establishing his intent to waive his right to a jury trial. 5/28/09RP 5. Rose never filed a written waiver of his right to trial by unanimous jury.

Even though the court did not intend its discussion with Rose to substitute for a formal written waiver, the court engaged in a somewhat vague discussion with Rose about the underlying charges at issue and without explaining that he would be waiving his constitutional right to a unanimous jury verdict. 5/28/09RP 3-5. This discussion does not meet the necessary showing of a knowing, intelligent, and voluntary waiver of the right to a trial by a unanimous jury, and does not defeat the presumption that Rose did not waive his right to a jury trial. Hos, Slip op. at 10.

On May 28, 2009, defense counsel Thompson announced, "we are here for pretrial today. I will say with some trepidation that

I am ready for trial." 5/28/09RP 2. Thompson explained that Rose faced unnamed charges under two separate cause numbers. Id.

Thompson then said, "my hope is that - - and I believe my client thinks it is probably appropriate - - that on one cause number where he has possession of a controlled substance being the charge, that we will waive" [jury]. 5/28/09RP 2 (emphasis added). Counsel stated his intent was to preserve the suppression hearing issue that had been litigated in the possession case and "we probably will waive our right to speedy trial and either go on stipulated facts or have a bench trial." 5/28/09RP 3 (emphasis added).

The court then asked Rose whether his intent was to waive his "right to a jury trial" in the case with two charges, possession of stolen property and possession of a controlled substance, methamphetamine. 5/28/09RP 3. The court explained that "the cause will not be decided by 12 citizens now, but rather it will be decided by one judge." 5/28/09RP 3-4. The court asked Rose if he "discussed the differences with Mr. Thompson," and Rose said, "[w]e're talking about it as we speak." 5/28/09RP 4.

The court asked Rose if he was waiving his "right to proceed with a jury trial," and Rose asked, "that was for the suppression

hearing one?" 5/28/09RP 4. The court said it was the case with a suppression hearing and Rose said yes, "I understand then." 5/28/09RP 4. The court ended the matter by saying it "would want" a written waiver from Rose. Id.

Although this in-court discussion touches on the right to a jury trial, it does not constitute a knowing, intelligent, and voluntary waiver of the right to trial by jury as protected by Article I, sections 21 and 22 of the Washington Constitution. Rose was never informed of the constitutional requirement that the 12 jurors must unanimously agree that the State has proven all essential elements of the offense, as opposed to convincing only one single judge that the State met its burden of proof. The right to a unanimous jury verdict is strongly protected in Washington. State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984) (defense counsel's failure to request unanimity instruction does not waive constitutional right to unanimous verdict). Rose could not have knowingly, intelligently, and voluntarily waived his right to a unanimous jury verdict when he was not actually informed of that right.

Additionally, Rose never indicated he fully understood the waiver of the jury trial rights or the charges affected. Rose had separate cases pending and was not waiving a jury trial for all

cases. 5/28/09RP 2-3. Thompson said he thought it was "probably appropriate" to waive a jury for the case where "there was a suppression hearing," and Rose also asked whether the waiver was "for the suppression hearing one." 5/28/09RP 2-4. But the suppression hearing that had recently occurred only mentioned the charge involving possession of a controlled substance. 5/21/09RP 3-37 (testimony at CrR 3.6 hearing regarding arrest for possessing drug paraphernalia). The repeated reference to the case as the "suppression hearing one" shows that the discussion focused Rose's attention on only one of the two charges at issue.

Significantly, preserving the suppression issue for appeal was not Rose's only concern and not the only matter he intended to pursue. 5/28/09RP 3. Rose was also charged with possession of a stolen credit card and testified at trial that he did not knowingly possess the credit card. 6/30/09RP 104, 107. He raised a legal defense, that he could not commit possession of a stolen access device when the "device" was something found in the trash and cost money to activate; as well as a factual defense, that he was simply taking out trash and did not know the card was in his bag. 6/30/09RP 118-19; CP 24 (court's written decision). His defense to the charge would have raised reasonable questions for a jury, but

no one discussed with him that the prosecution would need the agreement of all 12 jurors in order to convict him absent a waiver of his right to a jury trial.

The lack of written waiver and inadequate discussion of the rights at stake when forgoing a trial by jury as guaranteed by the Washington Constitution as well as the federal constitution constitutes an inadequate personal ratification of the decision to waive trial by jury and the right to a unanimous jury verdict. The inadequate waiver requires reversal of the convictions and remand for a new trial. Hos, Slip op. at 12-13.

3. THE POLICE LACKED PROBABLE CAUSE TO ARREST ROSE AND THE EVIDENCE GATHERED AFTER HIS ARREST MUST BE SUPPRESSED

a. An arrest must be supported by probable cause or a valid warrant. The individual right to privacy means that the police may not disturb a person's private affairs unless objective facts indicate that the individual is committing a crime. State v. Grande, 164 Wn.2d 135, 141, 187 P.3d 248 (2008). The Fourth Amendment to the United States Constitution provides: "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be

violated." Similarly, the Washington Constitution provides greater protection to individual privacy rights than the Fourth Amendment, as it guarantees that "no person shall be disturbed in his private affairs, or his home invaded, without authority of law." State v. Jones, 146 Wn.2d 328, 332, 45 P.3d 1062 (2002); Wash. Const. Art. I, § 7. Warrantless seizures are per se unreasonable under the Fourth Amendment and Article I, § 7 absent an exception. State v. Rankin, 151 Wn.2d 689, 695, 92 P.3d 202 (2004); State v. Ladson, 138 Wn.2d 343, 349, 979 P.2d 833 (1999).

A police officer needs probable cause to make a warrantless arrest. Grande, 164 Wn.2d at 141. An officer has probable cause to arrest a person if the facts and circumstances within his knowledge are sufficient to cause a person of reasonable caution to believe that the suspect is committing or has committed a crime. State v. Graham, 130 Wn.2d 711, 724, 927 P.2d 227 (1996) (quoting State v. Terrovona, 105 Wn.2d 632, 643, 716 P.2d 295 (1986)).

b. The police officer's forceful detention of Rose constituted an arrest without probable cause. Because of the explicit protections for individual privacy under the Washington Constitution, people in this state "are free from unnecessary police

intrusion into our private affairs unless a police officer can clearly associate the crime with the individual." Grande, 164 Wn.2d at 145. A person may not be arrested and then required to wait until evidence "alleviat[es] the suspicion." Id. Instead, "[u]nless there is specific evidence pinpointing the crime on a person, that person has a right to their own privacy and constitutional protection against police searches and seizures." Id. at 145-46.

Here, a police officer detained, frisked, and handcuffed Rose, and then enclosed him inside a police car. Not only was Rose seized at this time, his liberty was fully restricted and he was consequently held in custody akin to a full arrest. There is no probable cause to arrest someone for an offense the police did not observe solely because the person matches a description of a potential perpetrator, rather only an investigative detention may be permitted. State v. Wheeler, 108 Wn.2d 230, 234-35, 737 P.2d 1005 (1987).

Forcibly restraining someone and holding him in a closed police car is a "significant" physical intrusion. Wheeler, 108 Wn.2d at 235. An investigative detention must be imposed by the least intrusive means possible. State v. Garvin, 166 Wn.2d 242, 254,

207 P.3d 1266 (2009); State v. Williams, 102 Wn.2d 733, 738, 689 P.2d 1065 (1984).

The police must have legitimate fear for safety to handcuff a person and keep him in the police car for a period of time. Wheeler, 108 Wn.2d at 235. The mere fact that a person is fidgety, when the person is cooperative, in a public area, in the middle of the day, and without any other articulated basis for concern, there is neither probable cause for an arrest nor reasonable grounds to deprive the person of his liberty by fully restraining him. Once the officer removed Rose's knife and patted him down, he had no reason to fear for his safety and no valid basis to handcuff Rose and hold him in formal custody.

Due to the absence of evidence that the officer denied Rose his liberty based on legitimate and narrowly tailored safety concerns, the trial court did not enter any findings the State had any reason to handcuff Rose and hold him inside the police car. The court's failure to find the officer forcibly detained Rose to the degree associated with an arrest due to legitimate safety concerns demonstrates the State did not prove sufficient safety concerns existed. Armenta, 134 Wn.2d at 14. The court found that the officer could frisk Rose after seeing the pocket knife stored on his

belt, but the officer removed the knife and patted down Rose to determine whether Rose had any additional items that might present a danger. CP 53. Rose did not have any other weapons and the officer removed Rose's knife yet the officer still handcuffed Rose and demanded he sit in a closed police car for an unexplained period of time. 5/21/09RP 9.

The court made no findings indicating the officer was justified in significantly restraining Rose's liberty by handcuffing him and putting him in a closed police car. CP 52-53. Rose was cooperative during the search and offered no resistance to the officer. 5/21/09RP 10.

The officer handcuffed Rose even before he frisked him, and did not remove the handcuffs during the entire encounter. 5/21/09RP 11, 25. He closed the police car door and housed Rose inside the car. Id. This significant physical intrusion exceeded the scope of any permissible investigative detention where the State did not prove this forcible intrusion into Rose's liberty was required for the safety of the police officer. Rose's arrest was unjustified, as it occurred when he was forcibly detained without probable cause, and all evidence gathered as a result must be suppressed.

c. There was no probable cause to arrest Rose based on possession of drug paraphernalia. Mere possession of potential drug paraphernalia is not a crime and cannot be the basis for an arrest. State v. O'Neill, 148 Wn.2d 564, 584 n.8, 62 P.3d 489 (2003); State v. McKenna, 91 Wn.App. 554, 563, 958 P.2d 1017 (1998); State v. Lowrimore, 67 Wn.App. 949, 959, 841 P.2d 779 (1992). Using paraphernalia to ingest drugs is a misdemeanor, but a police officer cannot arrest a person for a misdemeanor unless the arrestee commits that crime in the officer's presence. RCW 69.50.412; RCW 10.31.100; O'Neill, 148 Wn.2d at 584 n.8.

Here, Croskey did not see Rose use drug paraphernalia. 5/21/09RP 13; see RCW 69.50.412. He did not testify that Rose seemed to be under the influence of drugs based on the officer's experience or training. He did not claim to have probable cause that Rose was in possession of a controlled substance. He said he saw a "white, chalky substance" which led him to believe that the glass pipe was "consistent with" drug paraphernalia. 5/21/09RP 12. The court's formal findings of fact find only that Croskey saw "a residue" in the glass pipe. CP 53 (Finding of Fact 12). The court did not find the officer believed this residue was a controlled

substance, and the officer did not see Rose engaging in activity that appeared to him, in his experience, to be actual drug use. See State v. Neely, 113 Wn.App. 100, 108, 52 P.3d 539 (2002) (sufficient evidence use of drug paraphernalia when woman in car with tools used to ingest drugs late at night and appearing to use drugs by body motions).

Here, the court did not find the officer had probable cause to believe Rose used the drug paraphernalia, and therefore, probable cause to arrest him did not exist. Because the arrest was not valid, the search of Rose and his bag were invalid and the evidence obtained should have been suppressed.

d. Evidence gathered as a result of the illegal search and seizure must be suppressed. The warrantless detention, arrest, and subsequent search of Rose's person and property violated Article I, section 7 and the Fourth Amendment. "The exclusionary rule mandates the suppression of evidence gathered through unconstitutional means." Garvin, 166 Wn.2d at 254. Therefore, "[t]he evidence collected from that search should be suppressed, and the resulting convictions reversed," because the convictions rest on illegally gathered evidence. State v. Valdez, __ Wn.2d __, 2009 WL 4985242 (2009); Wong Sun v. United States,

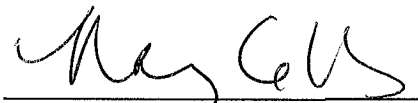
371 U.S. 471, 485, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). Absent the illegal seizure, the police would not have observed the purported drug paraphernalia. Moreover, the drug paraphernalia was an impermissible basis for arresting Rose, and the evidence gathered after that unlawful arrest must be suppressed.

F. CONCLUSION.

For the reasons stated above, Douglas Rose respectfully asks this Court to reverse his convictions after suppressing the evidence illegally seized following his unlawful arrest, reverse his conviction for possession of stolen property based on insufficient evidence, and order a new trial due to the invalid jury waiver in the event there remains sufficient evidence to further prosecute the case.

DATED this 29th day of January 2010.

Respectfully submitted,



NANCY P. COLLINS (WSBA 28806)
Washington Appellate Project (91052)
Attorneys for Appellant

APPENDIX A

ORIGINAL

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF BENTON

STATE OF WASHINGTON, Plaintiff, vs. DOUGLAS C. ROSE, Defendant	NO. 09-1-00111-5 FINDINGS OF FACT AND CONCLUSIONS OF LAW ON BENCH TRIAL

THIS MATTER, having come duly and regularly before the Court for a bench trial on June 30, 2009, the defendant being personally present and represented by Robert Thompson, Attorney for Defendant, and the State of Washington being represented by Megan A Bredeweg, Deputy Prosecuting Attorney for Benton County, the Court having heard the testimony of the witnesses and having been fully advised in the premises, now, therefore, makes the following findings:

FINDINGS OF FACT

1. The defendant was detained by Officer Croskrey in connection with a reported possible criminal trespass or residential burglary.
2. The defendant was carrying a green military-style courier bag.
3. During the course of the stop, Officer Croskrey noticed a glass tube extending from an exterior pocket of the bag.
4. Officer Croskrey recognized the tube to be a pipe commonly used to smoke narcotics because of its size, shape, and the presence of a white powdery material therein.
5. The defendant was arrested.
6. The pipe was sent to the Washington State Crime Laboratory, where the white material was tested and confirmed to be methamphetamine.
7. While the chain of custody evidence was not perfect, the evidence was such that I

conclude that the pipe that was tested was the same pipe that Officer Croskrey found in the defendant's bag and that the pipe was not tampered with before it was tested.

8. In a search of the defendant's person incident to arrest, a credit card issued in the name of Ruth A. Georges was found in the defendant's pocket.
9. The defendant advised Officer Croskrey that he had "found" the card.
10. The defendant had been in Ms. Georges' apartment within an hour or two before his arrest.
11. Ms. Georges had not activated the card because she did not wish to pay the required fee of $30.
12. No evidence was offered that would prevent the court from concluding that the card could be activated by someone other than Ms. Georges. there was no evidence on that point.
13. Ms. Georges had thrown the credit card into the trash receptacle that was located in, and at all times relevant hereto, remained in her apartment.
14. The defendant obtained the card by removing it from Ms. Georges' garbage.
15. The defendant did not have the consent of Ms. Georges to remove the card from her garbage, to possess or otherwise use the card.
16. The defendant's testimony that Ms. Georges dumped her garbage into and on top of his green bag, thereby intermingling the contents of the garbage with his possessions is not plausible.
17. The defendant was in possession of the pipe that contained methamphetamine.
18. The defendant was not privileged to possess methamphetamine.
19. The credit card was a card, plate, code, account number, or other means of account access that can be used alone or in conjunction with another access device to obtain money, goods, services, or anything else of value, or that can be used to initiate a transfer of funds, other than a transfer originated solely by paper instrument.
20. The defendant took the card without the consent or knowledge of Ms. Georges.
21. The defendant withheld and appropriated the card for his own use at a time when he was not authorized to do so.
22. The defendant intended to deprive Ms. Georges of the possession and use of the credit card.

23. The defendant knew that he possessed the credit card.
24. The defendant knew that the credit card was stolen.
25. The defendant was in possession of the credit card knowing that it was stolen.
26. All of the above occurred in Benton County, State of Washington, on September 16, 2008.

CONCLUSIONS OF LAW

1. The credit card was an access device even though it had not been activated. See State v. Clay, 144 Wn.App. 894, 194 P.3d 674 (2008).
2. The defendant wrongfully obtained and exercised unauthorized control over the credit card, even though he obtained it from Ms. Georges' garbage. See State v. Askham, 120 Wn.App. 872, 884-885, 86 P.3d 1224 (2004).
3. Methamphetamine is a controlled substance.
4. The defendant is guilty of the crime of unlawful possession of a controlled substance in the form of methamphetamine.
5. The defendant is guilty of the crime of possession of stolen property in the second degree.

DONE IN OPEN COURT this 17 day of July, 2009.

Judge Bruce A. Spanner

Presented by:

Megan A Bredeweg
Deputy Prosecuting Attorney
WSBA #37847
Ofc ID 91004

Approved as to form:

Robert Thompson
Attorney for Defendant
WSBA #13003

APPENDIX B

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF BENTON

STATE OF WASHINGTON, Plaintiff, vs. DOUGLAS C. ROSE, Defendant.	NO. 09-1-00111-5 FINDINGS OF FACT AND CONCLUSIONS OF LAW ON CrR 3.6 MOTION

THIS MATTER, having come duly and regularly before the Court for motion pursuant to CrR 3.6, on the 21st day of May, 2009, the defendant being personally present and represented by Robert Thompson, Attorney for Defendant, and the State of Washington being represented by Megan A Bredeweg, Deputy Prosecuting Attorney for Benton County, the Court having reviewed the case record to date, and having been fully advised in the premises, now, therefore, makes the following findings:

FINDINGS OF FACTS

1. On September 16, 2008, Richland Police Department Officers Jenkins and Croskrey responded to a 911 call from 345 Van Giesen.
2. Officers learned from dispatch that it was potentially a trespass, burglary, or attempted burglary, possibly interrupted.
3. The 911 caller described the individual as male and matching the defendant's description.

4. Officer Jenkins contacted the caller on the south side of the Columbia Apartment complex at her apartment.
5. Officer Croskrey began checking the area in the direction the male had left as described by the caller.
6. Officer Croskrey located the defendant and contacted him.
7. Officer Croskrey saw a knife on the defendant and that he was fidgety.
8. Officer Croskrey asked the defendant to set down his bag, handcuffed him, frisked him, and seated him in the patrol car.
9. Officer Croskrey told the defendant he was not under arrest at that time.
10. Officer Croskrey was waiting for Officer Jenkins to arrive from contacting the victim.
11. Officer Croskrey saw 1 ½ to 2 inches of tube sticking out of a pocket on the defendant's bag.
12. Officer Croskrey further saw a residue in the tube in the daylight.
13. Officer Jenkins arrived and informed Officer Croskrey that the victim did not wish to pursue charges.

CONCLUSIONS OF LAW

1. The initial detention of the defendant was proper pursuant to Terry v. Ohio.
2. The frisk for weapons was appropriate as Officer Croskrey observed the defendant was fidgety and had a knife.
3. Officer Croskrey was then in an ongoing investigation waiting for Officer Jenkins to arrive from contacting the victim.
4. There is no indication that the defendant was seated in the patrol car for a long period of time.
5. The continued detention of the defendant was proper because it was an ongoing investigation.
6. The arrest of the defendant for possession of drug paraphernalia was proper.
7. The motion to suppress is denied.

DONE IN OPEN COURT this 14 day of September, 2009.

Carrie Runge
Judge

Presented by:

Megan A Bredeweg
Megan A Bredeweg
Deputy Prosecuting Attorney
WSBA #37847
OFC ID 91004

Approved as to form:

Robert Thompson
Attorney For Defendant
WSBA #_____

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 28403-4-III
v.	)	
	)	
DOUGLAS ROSE,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29TH DAY OF JANUARY, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] MEGAN BREDEWEG, DPA BENTON COUNTY PROSECUTOR'S OFFICE 7122 W OKANOGAN AVE BLDG A KENNEWICK, WA 99336-2359	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] DOUGLAS ROSE 263111 CEDAR CREEK CORRECTIONS CENTER PO BOX 37 LITTLE ROCK, WA 98556-0037	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 29TH DAY OF JANUARY, 2010.

X_____

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